A

LEE AH HAH & ANOR v. TEH CHIN LAN & ORS

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[SUIT NO: AA-22NCVC-85-08-2017]
12 FEBRUARY 2019

B

LEGAL PROFESSION: *Practice of law – Practice and etiquette – Application to bar legal firm from representing plaintiffs – Whether solicitor of legal firm took part actively in Extraordinary General Meeting ('EGM') of company – Whether there were alleged wrongdoings by solicitor – Whether solicitor present at EGM on proxy of another individual – Whether solicitor not at EGM in capacity of partner of legal firm – Whether possibility of solicitor being called as witness for suit automatically triggered application of r. 28 of Legal Profession (Practice and Etiquette) Rules 1978 – Whether ethical restrictions for legal firm to appear for plaintiffs arose – Whether legal firm ought to be disqualified*

C

D

Enclosure 66 was an application by the third defendant in the main suit, for this court to make an order pursuant to r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, that Messrs WY Chan & Roy be barred from representing the plaintiffs in the main suit, and that the same firm of advocates and solicitors be barred from representing the first and second

E

defendants in their counterclaim. The main ground of this application was that one Mr Nathan Subramaniam ('Mr Nathan'), a partner at Messrs WY Chan & Roy, who was present at the Extraordinary General Meeting ('EGM') of Investland Kampar Development Sdn Bhd, the seventh defendant, on 7 September 2017, and took part actively at that EGM as the chairman of

F

the meeting, would be called as a witness in the present case. The issues that arose were *inter alia* (i) whether there were wrongdoings by Mr Nathan; (ii) whether Mr Nathan attended the EGM as a proxy to one Chin Now (the second plaintiff in the main suit); and (iii) whether there existed any ethical restriction for Messrs WY Chan & Roy to appear for the plaintiffs.

G

Held (dismissing application):

(1) The issues pertaining to the alleged wrongdoings by Mr Nathan at the EGM were not only mere allegations which failed to be supported by document or other evidence, but there were also issues of fact that must be proven not merely by affidavit averments. It must be determined by

H

the court only after having the benefit of considering evidence by witnesses at a hearing. This ground therefore failed. (para 14)

(2) The fact that Mr Nathan was present at the EGM on 7 September 2017 on the proxy of Chin Now and acted as the chairman of the EGM were not disputed by the parties. As the EGM was held on 7 September 2017,

I

the provisions of ss. 294, 334, 335, 336, 337 and 338 of the Companies

Act 2016 applied. When Mr Nathan attended the EGM as Chin Now's proxy, his words and actions at the EGM, including those alleged wrongdoings, were those of Chin Now, unless proven otherwise and except those actions of his that were in contravention with laws. This was an issue of fact and law that could not be determined merely through affidavit. The law also allowed Mr Nathan to be appointed as chairman of the EGM, if so allowed by a resolution and agreed upon by members present at the said EGM. (paras 18-20)

(3) Mr Nathan was not at the EGM in his capacity as a partner of Messrs WY Chan & Roy. Therefore, r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 did not apply. Further, the mere fact that Mr Nathan would possibly be called as a witness did not automatically trigger the application of r. 28. The applicant must satisfy this court that Messrs WY Chan & Roy must be disqualified in order to eliminate the possibility of a conflict of interest or compromising the interests of the contesting parties. The applicant failed to show this. In fact, such possibilities did not arise as Mr Nathan was not present at the EGM in his capacity as a solicitor or a partner of Messrs WY Chan & Roy. (para 29)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1987] 1 LNS 70 HC ***(refd)***

Dato' Sri Bala Krishnan Vellasamy & Ors v. Cityteam Media Sdn Bhd & Anor [2015] 4 CLJ 247 HC ***(refd)***

Dr Trilochan Kaur Mohan Singh v. The Malaysian Dental Council & Anor [2010] 2 CLJ 1037 HC ***(refd)***

Hongkong Bank Malaysia Bhd v. Mohammed Noor Tamliho [2002] 3 CLJ 139 ***(refd)***

Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd [2010] 2 CLJ 1061 HC ***(refd)***

Quah Poh Keat & Ors v. Ranjit Singh Taram Singh [2009] 4 CLJ 316 CA ***(refd)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 HC ***(refd)***

Tan Chang Yong Holdings Sdn Bhd v. Tan Wee Lee & Ors [2018] 1 LNS 292 ***(refd)***

Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 42(2), 294, 334, 335, 336, 337, 338

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5, 27, 28(a), 30, 56

Rules of Court 2012, O. 64 r. 4

(Main Suit)

For the plaintiffs - Faizul Hilmy Ahmad Zamri; M/s WY Chan & Roy

For the 1st defendant - M/s Thevin Chandran (not present)

For the 2nd, 4th & 5th defendants - KL Mah; M/s KS Su & Mah

For the 3rd defendant - Cheah Sau Voon; M/s KH Wong, Chin & Cheah

For the 6th defendant - Lee Boon Koon; M/s Owee & Ho

A *(Counter-Claim)*
For the plaintiff - Lee Boon Koon; M/s Owee & Ho
For the 1st & 2nd defendants - Faizul Hilmy Ahmad Zamri; M/s WY Chan & Roy
For the 5th defendant - Norazli Nordin; M/s Maxwell, Kenion, Cowdy & Jones

Reported by Suhainah Wahiduddin

B

JUDGMENT

Mohd Radzi Harun JC:

The Application

C **[1]** Enclosure 66 is an application by Lee Ming Hong, the third defendant in the main suit, for this court to make an order pursuant to r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, that Messrs WY Chan & Roy be barred from representing the plaintiffs in the main suit, and that the same firm of advocates and solicitors be barred from representing the first and second defendants in the counter-claim.

D **[2]** The main ground of this application was that one Mr Nathan Subramaniam Eliathamby ("Mr Nathan"), a partner at Messrs WY Chan & Roy, who was present at the Extraordinary General Meeting ("EGM") of Investland Kampar Development Sdn Bhd, the seven defendant, on 7 September 2017 and took part actively at that EGM as the Chairman of the meeting, would be called as a witness in the present case.

E

[3] Upon considering the facts and the law, having heard the learned counsel for both parties, and after perusing the cause papers and written submissions, I had dismissed the application without order as to costs.

F **[4]** The applicant now appeals against my finding and I submit below my grounds of decision.

Background Facts

[5] Based on the plaintiffs' statement of claim in the main suit, the brief G background facts of the plaintiffs' case against the defendants are as follows:

(i) The first, second and third defendants are shareholders and directors at Kampar Sentral Property Sdn Bhd ("D6").

(ii) The first and second plaintiffs, and the first, second, fourth and fifth defendants are the shareholders in Investland Kampar Development Sdn H Bhd ("D7").

(iii) The second defendant is a director and permanent chairman of D7. The third defendant is a non-shareholding director at D7.

I

(iv) The plaintiffs' case against the first, second, fourth, fifth and sixth defendants was that the first, second, fourth and fifth defendants had transferred their shares in D7 to D6 without first offering those shares to the plaintiffs, the existing shareholders in D7. This contravened s. 42(2) of the Companies Act 2016 and art. 6 of the Articles of Association of D7. The transfer had resulted in D6 holding 50% shares in D7.

(v) As for the second and third defendants, the plaintiffs claimed that as the directors of D7, their act of approving the said transfer of shares was in contravention of art. 5 of the Articles of Association of D7. They had breached their fiduciary duties to protect the interest of all existing shareholders of D7.

(vi) Based on the above, the plaintiffs prayed for this court.

(a) to declare that the transfer of D7's shares by the first, second, fourth and fifth defendants to D6 was null and void and that the approval by the second and third defendants for that transfer was a breach of their fiduciary duties as directors of D7;

(b) to order the Registrar of Companies to rectify the membership of D7 by deleting D6 as the holder of 750,000 shares in D7;

(c) to declare that any resolutions, throughout the period when D6 is a shareholder of D7, shall be declared null and void.

[6] D6's counter-claim stated the following:

(i) The plaintiffs are husband and wife. They are the parents to Lee Chee Kong, the sixth defendant in the counter-claim.

(ii) The plaintiffs are merely Lee Chee Kong's nominees and Lee Chee Kong remains as the real owner of the 450,000 shares in D7.

(iii) All the shareholders in D7, including Lee Chee Kong, are aware of the fact that D6 was established on 5 June 2017 with the sole intent and purpose of subsequent holding of D7's shares.

(iv) The transfer of shares transactions from D7 into D6 reflect that purpose and intent with shares injection into D6 by the first, second, fourth and fifth defendants named in the main suit.

(v) EGM of D7 that was held on 7 September 2017 was at the request of Lee Ah Hah and/or Lee Chee Kong through a requisition letter dated 31 July 2017 issued by Lee Ah Hah.

(vi) The said EGM was held, *inter alia*, for the consideration of the following resolutions:

A (a) Expulsion of Tan Boon Keat as a director of D7 (resolution 1);

(b) Appointment of Teh Chin Lan, Lee Chee Ho and Tan Chee Seng as D7's new directors (resolution 2).

[7] Consequentially, D6 prayed in its counter-claim for this court, *inter*
B *alia*, to order:

(a) the 450,000 shares in D7 that had been registered in the names of the plaintiffs in the main suit to be declared as shares held in the interest of Lee Chee Kong, the real owner of the shares;

C (b) the said resolutions 1 and 2 to be declared null and void;

(c) damages to be paid by the defendants.

The Findings For Enclosure 66

[8] In considering this application in encl. 66, I had taken into
D consideration the above facts and the following cause papers:

(i) The writ and the statement of claim filed by the plaintiffs in the main suit on 30 August 2017;

(ii) The amended statement of defence and counter-claim of Kampar Sentral Property Sdn Bhd, the sixth defendant in the main suit, filed on
E 6 November 2017;

(iii) Affidavit by the applicant, Lee Ming Hong, affirmed on 14 September 2018; and

(iv) Affidavit by Tan Boon Keat affirmed on 16 October 2018, also on behalf
F of Lee Sing Yew and Koh Siew King.

[9] I had also referred to the written submissions of the learned counsel for the applicant and the respondent, and the oral submissions of the counsel during the hearing of encl. 66 on 8 November 2018.

G **[10]** The affidavit in support of this application deposed by Lee Ming Hong, and affirmed on 14 September 2018, stated only one issue or ground for this application, which relates to Mr Nathan. However, this court found that Part B of the written submission of learned counsel for the applicant stated another ground, apart from the one that relates to Mr Nathan. This other ground for this application is as mentioned in para. a of Part B to the
H written submission as follows:

a. Defendan ketiga telah dituntut oleh plaintif-plaintif (dalam Tindakan Asal) sebagai seorang individu oleh kerana beliau ialah:

i. seorang pengarah dan pemegang 1 unit syer dalam Kampar
I Sentral Property Sdn Bhd, defendan keenam; dan

ii. Seorang pengarah tanpa memegang syer dalam Investland Development Sdn Bhd, defendan ketujuh.

[11] Although it was mentioned as the first ground for the application, the subsequent paragraphs of the written submission failed to provide elaboration. This court ruled that this ground has no relevance to this application to remove Messrs WY Chan & Roy as solicitor for the plaintiffs in the main suit and would not dwell into it any further.

[12] I shall now move on to the second ground for the application.

[13] Paragraphs 8 to 11 of the affidavit by Lee Ming Hong affirmed on 14 September 2018, averred the wrongdoings of Mr Nathan. I further found that Tan Boon Keat, the second defendant in the main suit, had affirmed an affidavit on 16 October 2018 which supported Lee Ming Hong's affidavit. It appears to me from the averments of Tan Boon Keat that he was also present at the said EGM. But Tan Boon Keat's affidavit did not confirm the deposition by Lee Ming Hong pertaining to Mr Nathan's wrongdoings.

[14] I rule that the issues pertaining to the alleged wrongdoings by Mr Nathan at the EGM are not only mere allegations which failed to be supported by document or other evidence, but these are also issues of fact that must be proven not merely by affidavit averments. It must be determined by the court only after having the benefit of considering evidence by witnesses at a hearing. This second ground therefore fails.

[15] I now move on to the third issue raised by the respondents'/plaintiffs' counsel during the hearing of encl. 66 that Mr Nathan attended the EGM on 7 September 2017 as a proxy to Chin Now, the second plaintiff. To this point, learned counsel for the third defendant informed the court that the contention that Mr Nathan attended the EGM as a proxy to Chin Now shall be disregarded by this court as it was not pleaded and is therefore a mere statement adduced from the Bar by the respondents'/plaintiffs' counsel.

[16] I cannot agree with the contention of counsel for the third defendant. In actual fact, para. 4(b) of the affidavit in support of this application deposed by the third defendant himself on 4 September 2018 stated as below:

> 4. Pada 7/9/2017, pemegang-pemegang saham telah memanggil suatu Mesyuarat Luarbiasa Umum defendan ketujuh ("EGM tersebut") di premis Setiausaha Syarikat, Tetuan Ridzuan Lee Management (IP 0112947-U), di alamat No. 5, 1st Floor, Jalan Gopeng, 31900 Kampar, Perak. Para hadirin pada EGM tersebut ialah seperti berikut:
>
> (a) ..
>
> (b) Nathan Subramaniam Eliathamby ("Nathan") sebagai proksi Chin Now (Plaintiff Kedua);
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) ...

[17] The issue of proxy is clearly an issue that had been pleaded and would form part of the issues being considered by this court in determining this application. In fact, the issue pertaining to Mr Nathan's proxy to Chin Now at the EGM forms the main ground of my finding to dismiss this application.

[18] It is my finding that the fact that Mr Nathan was present at the EGM on 7 September 2017 on the proxy of Chin Now (the second plaintiff in the main suit), and acted as the Chairman of the EGM were not disputed by the parties.

[19] As the EGM was held on 7 September 2017, the provisions of the Companies Act 2016 which came into effect on 31 January 2017 applies. Particularly with regards to "proxy", the relevant provisions are found in s. 294 on "votes by proxy" and Part III, Division 5, Subdivision 6, ss. 334-338 on "Proxies".

[20] The law is clear that when Mr Nathan attended the EGM as Chin Now's proxy, his words and actions at the EGM, including those alleged wrongdoings, are those of Chin Now, unless proven otherwise and except those actions of his that are in contravention with laws. It is my finding further that this is an issue of fact and law that cannot be determined merely through affidavit. The law also allows Mr Nathan to be appointed as Chairman of the EGM, if so allowed by a resolution and agreed upon by the members present at the said EGM.

[21] With that backdrop and rulings, I would only need to confine my finding now on whether or not there exist any ethical restriction for Messrs WY Chan to appear for the plaintiffs, which is the fourth and main ground to support this application. Such restriction shall be in consonant with r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 which provides:

> 28(a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.
>
> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
>
> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[22] I apply the first principle relating to r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that was laid down by Wan Yahya J in *Wee Choo Keong v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346; [1990] 2 MLJ 239. His Lordship decided it was never the intention of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that an advocate and solicitor automatically must be precluded as a solicitor as soon as he becomes aware that he would be a potential witness. His Lordship's remarks were as follows:

> (1) Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.
>
> (2) The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the deceased's son wrote the police report. The problem could be fairly solved by confining the magistrate's order only to that stage of the proceeding if and when the deceased's son is about to give evidence.

[23] *Wee Choo Keong (supra)* was followed by Ramli Ali J (as His Lordship then was) in *Hongkong Bank Malaysia Bhd v. Mohammed Noor Tamliho* [2002] 3 CLJ 139.

[24] I further apply the second and most crucial principle pertaining to r. 28 that was laid down by the Court of Appeal in *Quah Poh Keat & Ors v. Ranjit Singh Taram Singh* [2009] 4 CLJ 316; [2009] 4 MLJ 293. This case was also cited by learned counsel for the applicant. There, Lim Heng Seng and Dato' Naban were acting directly in their capacity as solicitors. They took active part in the decision-making relating to the respondent Ranjit Singh. That was when the Court of Appeal agreed with the High Court to invoke r. 28(a) to disqualify the legal firm Messrs Lee Hishamuddin (the firm of which both Lim Heng Seng and Dato' Naban serve as partners) to avoid the embarrassment during trial and to "eliminate any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised." Suriyadi Halim Omar JCA (as His Lordship then was) in delivering the judgment of the Court of Appeal said the following:

> It would be unlikely that Datuk Naban would suggest to the respondent to "pack his bags and go" if the conclusion of the meeting had not been consonant with his or the firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other person.

A By all accounts, this finding of guilt of the respondent of gross misconduct, followed by the instruction to "pack his bags and go", were material issues as there was total denial of the charges by the respondent. With the demands of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 having been completely complied with, in particular the existence of the statutory requirements of material or disputed facts, any reasonable man armed with those facts would anticipate the calling of those two solicitors as witnesses. Thus, the High Court judge's ruling had eliminated any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised.

[25] Such need to eliminate the possibility of a conflict of interest or compromising the interests of the contesting parties do not arise in the case of Mr Nathan as he was not present at the EGM in his capacity as a solicitor. As had been settled and explained earlier, Mr Nathan was at the EGM as a proxy to Chin Now.

[26] Learned counsel for the applicant had cited *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing* [1997] 3 CLJ 754; [1997] 5 MLJ 705. There, Abdul Malik Ishak J (as His Lordship then was) was dealing with solicitor Mr Gana Muthusamy who was directly involved in the failed discussion and negotiation with the defendant. At that instance, Mr Gana Muthusamy had just been retained as the plaintiff's counsel. Soon after the negotiation failed, a letter of demand to the defendant was issued by Mr Gana's legal firm. By virtue of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Gana Muthusamy and the firm Messrs Gana Muthusamy were ordered by the learned judge to be barred from representing the plaintiff be it in open court or in chambers. The fact in this case, again, was in stark contrast with what Mr Nathan did when he was at the EGM. He was never there to represent Messrs WY Chan & Roy.

[27] This court had also referred to the other authorities cited by counsel for the applicant but found that those cases are irrelevant for purposes of the application before me now. The case of *Dr Trilochan Kaur Mohan Singh v. The Malaysian Dental Council & Anor* [2010] 2 CLJ 1037; [2009] 4 MLJ 244 dealt with rr. 3, 4, 5, 30 of the Legal Profession (Practice and Etiquette) Rules 1978. *Dato' Sri Bala Krishnan Vellasamy & Ors v. Cityteam Media Sdn Bhd & Anor* [2015] 4 CLJ 247 was a decision on disqualification but within the context of rr. 3, 5 and 27 of the Legal Profession (Practice and Etiquette) Rules 1978, and as such was regarded as this court as not applicable to this application. I had also decided not to apply the decision of *Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd* [2010] 2 CLJ 1061 as this case was relating to an application to disqualify solicitors on ground of impropriety.

[28] This court had also referred to the cases of *Tan Chang Yong Holdings Sdn Bhd v. Tan Wee Lee & Ors* [2018] 1 LNS 292; [2018] 1 LNS 292; [2018] MLJU 299 and *Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1987] 1 LNS 70; [1988] 1 MLJ 33, cited by learned counsel for the respondents/plaintiffs. However, this court found both of these authorities are also inapplicable for the application before me. The first case relates to an application under O. 64 r. 4 of the Rules of Court 2012, and the second case relates to an application under r. 56 of the Legal Profession (Practice and Etiquette) Rules 1978.

Conclusion

[29] Mr Nathan was present at the EGM on the proxy of Chin Now. His words and actions at the EGM are deemed by law as that of Chin Now's. He was not at the EGM in his capacity as a partner of Messrs WY Chan & Roy. Therefore, r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 does not apply. Further, the mere fact that Mr Nathan would possibly be called as a witness does not automatically trigger the application of r. 28. The applicant must satisfy this court that Messrs WY Chan & Roy must be disqualified in order to eliminate the possibility of a conflict of interest or compromising the interests of the contesting parties. The applicant failed to show this. In fact, such possibilities do not arise as Mr Nathan was not present at the EGM in his capacity as a solicitor or a partner of Messrs WY Chan & Roy.

[30] Based on the above-findings, I dismiss this application without order as to costs.